Supreme Court, U.S.
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No. 98-747

In The

Supreme Court of the United States

October Term, 1998

QUARTZ CREEK LAND COMPANY,

Petitioner,

v.

COANTHA CHILDERS,

Respondent.

On Petition For A Writ Of Certiorari To The Gunnison County District Courts State of Colorado

BRIEF IN OPPOSITION

GEORGE L. ZOELLNER
Counsel of Record
DONALD M. OSTRANDER
RONALD E. VONLEMBKE
DUNCAN, OSTRANDER & DINGESS, P.C.
7800 E. Union Avenue, Suite 550
Denver, Colorado 80237
(303) 779-0200
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Petitioner Quartz Creek Land Company recommended the following question for review:

> Whether the Takings Clause of the United States Constitution, as incorporated by the Fourteenth Amendment, precludes a State from authorizing an individual from taking private property for private use in order to provide more direct and convenient access.

Petitioner Quartz Creek Land Company's question for review is not an accurate reflection of the question presented to the courts below. The question presented for review should be:

> Whether the Takings Clause of the United States Constitution, as incorporated by the Fourteenth Amendment, precludes the Colorado Constitution from authorizing an individual to condemn a private way of access for purposes of allowing her landlocked property to be put to productive use.

TABLE OF CONTENTS

Page

I. RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW 1

II. STATEMENT OF THE CASE 2

III. REASONS FOR DENYING THE PETITION 4

A. CONDEMNATION OF PRIVATE WAYS OF NECESSITY INHERENTLY SERVE A PUBLIC USE BY "UNLOCKING" PREVIOUSLY UNPRODUCTIVE LAND 4

B. COLORADO'S DECLARATION THAT A PUBLIC PURPOSE IS SERVED BY THE CONDEMNATION OF PRIVATE WAYS OF NECESSITY IS FULLY CONSISTENT WITH EXISTING UNITED STATES SUPREME COURT PRECEDENT 7

C. CHILDERS WAS NOT CONDEMNING A PRIVATE WAY OF NECESSITY TO "COMMERCIALLY DEVELOP" HER LAND 11

IV. CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Bear Creek Development Corp. v. Dyer, 790 P.2d 899 (Colo.App. 1990) 4, 5

Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) 2, 8, 9

Crystal Park Co. v. Morton, 146 P. 566 (Colo.App. 1915) 5

Deseret Ranches of Florida, Inc. v. Bowman, 349 So.2d 155 (Fla. 1977) 6, 7

Gibson v. Cann, 66 P. 879 (Colo. 1901) 5

Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984) 2, 7, 8, 9, 10, 11

Kaschke v. Camfield, 102 P. 1061 (Colo. 1909) 5

Lamborn v. Bell, 32 P. 989 (Colo. 1893) 5

National Railroad Passenger Corp. v. Boston and Maine Corp., 503 U.S. 407, 112 S.Ct. 1394, 118 L. Ed. 2d 52 (1992) 10

Old Dominion Co. v. United States, 269 U.S. 55, 46 S.Ct. 39, 70 L. Ed. 162 (1925) 9

Ortiz v. Hansen, 83 P. 964 (Colo. 1905) 5

Pine Martin Min. Co. v. Empire Zinc Co., 11 P.2d 221 (Colo. 1932) 5

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S.Ct. 2862, 81 L. Ed. 2d 815 (1984) 10

United States ex rel. TVA v. Welch, 327 U.S. 546, 66 S.Ct. 715, 90 L. Ed. 843 (1946) 9

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS, STATUTES, AND RULES

Colo. Const. Art. II, § 14 .....2, 4

Colo. Rev. Stat. § 30-28-101(10)(b) 2, 3, 11

I. RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Petitioner Quartz Creek Land Company recommended the following question for review:

> Whether the Takings Clause of the United States Constitution, as incorporated by the Fourteenth Amendment, precludes a State from authorizing an individual from taking private property for private use in order to provide more direct and convenient access.

Petitioner's question is not an accurate reflection of the question presented to the courts below. First, Quartz Creek Land Company failed to inform this Court that Respondent Childers' property was completely *landlocked* and thereby without access to the state of Colorado's public road system. Second, Petitioner Quartz Creek Land Company failed to inform this Court that it had *not appealed* the trial court's determination that the subject property was landlocked. In the absence of appeal, the trial court's determination that the property was landlocked may not be questioned or disturbed.

In light of the trial court's determination that Respondent Childers' property was landlocked and without access to Colorado's public road system, the real question before this Court is whether a public purpose is served by the condemnation of a private route of access to "unlock" previously unproductive property for purposes of putting that property to productive use. A more accurate description of the question presented for review is, therefore:

Whether the Takings Clause of the United States Constitution, as incorporated by the Fourteenth Amendment, precludes the Colorado Constitution from authorizing an individual to condemn a private way of access for purposes of allowing her landlocked property to be put to productive use.

There is no reason for this Court to grant certiorari in this matter. Specifically, Colorado's declaration that a public purpose is served by the condemnation of private ways of necessity is fully consistent with this Court's decisions in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), and *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954) that specifically allow private condemnations which serve a legislatively-declared public purpose. In the absence of any important constitutional question or conflict with federal law or precedent, Quartz Creek Land Company's Petition for a Writ of Certiorari must, respectfully, be denied.

II. STATEMENT OF THE CASE

Respondent Coantha Childers owns 160 acres of mountain property in Gunnison County, Colorado. The property is zoned agricultural which allows one homesite per every thirty-five acres of land. § 30-28-101(10)(b), Colo.Rev.Stat.

On April 14, 1994, Childers filed a petition in condemnation pursuant to Article II, section 14, of the Colorado Constitution for the condemnation of a private way of necessity for purposes of "unlocking" her otherwise inaccessible mountain property. The identified route for

Childers' private way of necessity followed the alignment of a former permissive easement previously granted by Petitioner Quartz Creek Land Company to the Childers family for purposes of allowing the family to visit the subject property and the family's burial site.

Quartz Creek moved to dismiss Childers' petition in condemnation on grounds, among others, that the petition failed to state a public purpose for the condemnation.

Childers filed an amended petition in condemnation confirming that condemnation of a private way of necessity inherently served a public purpose by providing her landlocked property access to the state's road system. Quartz Creek filed a supplementary motion to dismiss the amended petition as well.

In response to assertions by Quartz Creek's appraisers that Childers' private way of necessity might be used by Childers to service a junk-yard or hotel, Childers also amended the easement describing her private way of necessity to show that the proposed road would be used only for domestic purposes serving no more than four residential sites pursuant to C.R.S. § 30-28-101(10)(b).

The trial court denied both Quartz Creek's Motion to Dismiss and its Supplemental Motion to Dismiss. (Pet. App. 1-5) The trial court found that Childers' property was landlocked and that providing access to her landlocked property inherently served a public purpose under the Colorado and United States Constitutions by allowing it to be put to productive use. The court provided:

> The purpose stated is to provide access from the county road system to a landlocked parcel. As held in *Bear Creek Development Corp. v. Dyer*, 790 P.2d 897 (Colo.App. 1990) access to property in the state serves a public purpose and is a sufficient purpose under the statute and Constitution.

Pet. App. 2-3.

The petition for condemnation of Childers' private way of necessity was heard by a jury which awarded Quartz Creek Land Company $1700 as just compensation.

III. REASONS FOR DENYING THE PETITION

A. CONDEMNATION OF PRIVATE WAYS OF NECESSITY INHERENTLY SERVE A PUBLIC USE BY "UNLOCKING" PREVIOUSLY UNPRODUCTIVE LAND

Article II, section 14, of the Colorado Constitution specifically authorizes owners of landlocked property to put their property to productive use by condemning a private way of necessity over adjoining property for domestic purposes.

Article II, Section 14, of the Colorado Constitution provides:

> Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.

Colorado's Appellate Courts have consistently found that condemnation of private property for purposes of allowing unproductive property to be put to productive use serves an inherent public purpose. *Pine Martin Min. Co. v. Empire Zinc Co.*, 11 P.2d 221 (Colo. 1932) (condemnation for water pipeline), *Kaschke v. Camfield*, 102 P. 1061 (Colo. 1909) (condemnation for private reservoir); *Lamborn v. Bell*, 32 P. 989 (Colo. 1893) (condemnation for private ditch to carry water); *Ortiz v. Hansen*, 83 P. 964 (Colo. 1905) (condemnation for private ditch); *Gibson v. Cann*, 66 P. 879 (Colo. 1901) (condemnation for private ditch); *Crystal Park Co. v. Morton*, 146 P. 566 (Colo.App. 1915) (condemnation for private way of necessity); *Bear Creek Development Corp. v. Dyer*, 790 P.2d 899 (Colo.App. 1990) (condemnation for private way of necessity).

In each of these cases, Colorado's Appellate Courts have upheld the proposition that property within the state should not be required to lie fallow and unproductive simply because, in the absence of condemnation, there is no way to provide access or bring utilities to the land. The "public" purpose served by Colorado's private condemnation law is, therefore, a recognition that the public suffers when the state's natural assets cannot be put to productive use. By extension, the state benefits from private condemnations that allow unproductive property to be put to productive use. This was the conclusion of the Colorado Supreme Court in *Pine Martin, supra* at 225:

> We believe that the constitutional provisions quoted above, and the statutory provisions, are not, when reasonably construed, in conflict with

> the Fourteenth Amendment to the federal Constitution. Although the words "private use" occur in our Constitution and statutes, it is obvious that they do not mean a *strictly* private use; that is to say, one having no relation to the public interest. The fact that the Constitution permits private property to be taken for certain specified uses is an implied declaration that such uses are so closely connected with the public interest as to be at least quasi public, or, in a modified sense, affected with a public interest. . . . [T]he foregoing considerations prompted our repeated decisions to the effect that under our Constitution and statutes private persons have the right to take private property for the uses specified in the Constitution.

The Florida Supreme Court also found that a public purpose is inherently served by allowing unproductive land to be put to productive use by condemnation of private ways of necessity. In *Deseret Ranches of Florida, Inc. v. Bowman*, 349 So.2d 155 (Fla. 1977), the Florida Court noted that "the doctrine is grounded in the public policy against the loss of the use of landlocked property," *Id.* at 156, and rejected the defendant's argument that condemnation only served a private interest:

> The inverse of appellant's contention is true: the statute's purpose is predominantly public and the benefit to the private landowner is incidental to the public purpose. . . . [S]ensible utilization of land continues to be one of our most important goals. We take notice that Florida grows in population at one of the fastest rates of any state in the nation. Useful land becomes more scarce in proportion to population increase, and the problem in this state becomes

> greater as tourism, commerce and the need for housing and agriculture goods grow. By its application to shut-off lands to be used for housing, agriculture, timber production and stock-raising, the statute is designed to fill these needs.

Id.

B. COLORADO'S DECLARATION THAT A PUBLIC PURPOSE IS SERVED BY THE CONDEMNATION OF PRIVATE WAYS OF NECESSITY IS FULLY CONSISTENT WITH EXISTING PRECEDENT

Colorado's declaration that condemnation of private ways of necessity serve a public purpose is fully consistent with United States Supreme Court precedent.

In *Hawaii Housing Authority v. Midkiff, supra,* this Court upheld the Hawaii Land Reform Act of 1967 that allowed the Hawaii Housing Authority to condemn private property belonging to lessors for the benefit of lessees living on the property. Under the Act, private tenants could petition the Hawaii Housing Authority to condemn the landlord's underlying fee interest for purposes of potentially selling that interest back to the tenants following condemnation. *Id.* at 234.

The State argued that a public purpose was served by the Act by breaking-up Hawaii's historic land oligopolies. The lessor-landowners claimed that the Act was an unconstitutional taking of private property because it used the state's eminent domain power to shift ownership from one private landowner to another. As a result, the lessor-landowners argued the Act did not serve a

public purpose. This Court disagreed, finding the Act served a public purpose by reducing the "social and economic evils of a land oligopoly traceable to [Hawaii's prior] monarchs." *Id.* at 241-242.

Midkiff cited to *Berman v. Parker, supra,* for the meaning of the term "public purpose" under the Fifth and Fourteenth Amendments. In *Berman,* this Court held constitutional the District of Columbia Redevelopment Act of 1945 which provided for the comprehensive use of the District's eminent domain power for urban renewal purposes.

In discussing whether the District of Columbia Redevelopment Act served a public purpose by condemning property that would in turn be sold to other private parties for redevelopment, the *Berman* Court noted that any attempt to define the limits of the legislature's police powers with regard to the issue of public purpose would be fruitless. *Id.* at 32. The Court provided that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . . " *Id.* The Court concluded "[t]his principle admits of no exception merely because the power of eminent domain is involved. . . . " *Id.*

Based on *Berman, Midkiff* held "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." *Midkiff,* at 240. The Court

held that deference to a legislature's determination of public use was required "until it is shown to involve an impossibility." *Id.*, quoting *Old Dominion Co. v. United States*, 269 U.S. 55, 46 S.Ct. 39, 70 L. Ed. 162 (1925).

While the judiciary has a role to play in reviewing a legislature's judgment of what constitutes a public use under the Fifth and Fourteenth Amendments, *Midkiff* noted that the court's role was "an extremely narrow one." *Id.*, quoting *Berman, supra* at 32. *Midkiff* provided that "[a]ny departure from . . . judicial restraint would result in courts deciding on what is and is not a governmental function, . . . a practice that has proved impracticable in other fields." *Id.* at 240-241, citing *United States ex rel. TVA v. Welch*, 327 U.S. 546, 66 S.Ct. 715, 90 L. Ed. 843 (1946). The Court concluded: "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241. "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings – no less than debates over the wisdom of other kinds of socio-economic legislation – are not to be carried out in the federal courts." *Id.* at 242-243.

Midkiff concluded that condemnation under Hawaii's Land Reform Act did not offend the public use requirements of the Fifth and Fourteenth Amendments simply because it served as a vehicle by which interests in property were transferred from one private party to another.

> The mere fact that property taken outright by eminent domain is transferred in the first

> instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use." *Rindge Co. v. Los Angeles*, 262 U.S. at 707, 43 S.Ct., at 692. "[W]hat in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair." *Block v. Hirsh*, 256 U.S., at 155, 41 S.Ct., at 459.

Id. at 243-244.

This Court has consistently confirmed *Midkiff* for the propositions that (1) public purposes may be served by condemnations that ultimately serve private interests, and (2) legislative determinations of public purpose may be overturned only if the moving party can show the state's determination to involve an impossibility. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L. Ed. 2d 815 (1984) (registration of pesticide data was not a private taking and served a public use); and *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 112 S.Ct. 1394, 118 L. Ed. 2d 52 (1992) (condemnation of railroad right-of-way on behalf of Amtrak served a public purpose).

Since the Colorado Constitution's declaration of the public purpose served by the condemnation of private ways of necessity does not involve an "impossibility,"

Midkiff, supra at 32, it does not offend the Fifth or Fourteenth Amendments to the United States Constitution and must, respectfully, be left undisturbed.

C. CHILDERS WAS NOT CONDEMNING A PRIVATE WAY OF NECESSITY TO "COMMERCIALLY DEVELOP" HER LAND

Another misstatement of fact must be clarified. Quartz Creek Land Company's Petition alleges that Childers' private way of necessity was designed to "allow her to subdivide and *commercially develop*" her property. Petition, at 11 (emphasis added). There is no support for this statement.

Pursuant to § 30-28-101(10)(b) Colo.Rev.Stat., Childers has the right under Colorado law to build one dwelling unit per 35 acres of property.[1] As evidenced by her amended petition in condemnation, Childers' private way of necessity in this matter was reasonably designed to accommodate the foreseeable uses to which her property could be put under Colorado's land use statute. Further, there is nothing in the record to suggest that Childers was planning to "subdivide" her property for purposes beyond those allowed by the statute. Indeed, the trial record shows that if Childers were to subdivide her mountain property at some point in the future, it would have been to build three additional homes for her children and immediate family.

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[1] Ironically, this is the same statute by which Quartz Creek Land Company has "subdivided" and built additional dwelling units on its property.

IV. CONCLUSION

Colorado's declaration that a public purpose is served by condemnation of private ways of necessity to unlock unproductive land is consistent with this Court's prior opinions and does not offend the Fifth or Fourteenth Amendments to the United States Constitution. Since the question presented is neither important nor in conflict with established precedent, Quartz Creek Land Company's Petition for a Writ of Certiorari should, respectfully, be denied.

DATED this 9th day of December, 1998.

Respectfully submitted,

GEORGE L. ZOELLNER
Counsel of Record
DONALD M. OSTRANDER
RONALD E. VONLEMBKE
DUNCAN, OSTRANDER & DINGESS, P.C.
7800 E. Union Avenue, Suite 550
Denver, Colorado 80237
(303) 779-0200
Counsel for Respondent